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No. 07-286

IN THE

Supreme Court of the United States

KAY STALEY,

Petitioner,

v.

HARRIS COUNTY, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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BRIEF FOR RESPONDENT IN OPPOSITION TO CONDITIONAL CROSS-PETITION

Staley's conditional cross-petition asks this Court to review the Fifth Circuit's determination that this matter has become moot. Staley does *not* contend, nor could she, that the mootness question meets this Court's traditional certiorari criteria. That is because the Fifth Circuit's analysis of the justiciability question does not create even an arguable circuit conflict on any issue whatsoever. In fact, even Staley concedes that her justiciability arguments "entail fact-intensive, case-specific applications of properly stated legal rules" (Cross-Pet. 13)—in other words, that this is the archetype for a case that has no business approaching this Court's merits docket.[1]

Nor can Staley reasonably contend that this case is, in fact, justiciable, such that this Court actually should order the Fifth Circuit to decide the merits of her Establishment Clause challenge to a monument that is no longer on display. Indeed, while the thrust of Staley's arguments appears directed to the "voluntary-cessation" doctrine—and, in particular, the notion that the case is justiciable because the County might redisplay the Mosher Monument (the "Monument") in the future—Staley herself concedes that "the details of the new display are entirely undeveloped in the record, thereby precluding application of the fact-specific analysis mandated by

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[1] While Staley asserts that the County's petition also presents fact-bound questions, that is demonstrably untrue. It is not every day of the week that a court of appeals, sitting en banc, rejects this Court's long-standing case law. In fact, under a conventional application of this Court's decision in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)—and under the view of several circuits that continue to follow *Munsingwear*—the County undoubtedly is entitled to vacatur. And, as demonstrated in the County's reply brief in support of petition No. 07-100, the questions on which the County seeks plenary review are the subject of circuit splits that Staley cannot convincingly explain away.

the Establishment Clause." Cross-Pet. 8. In short, Staley has offered no substantial argument that this case presents any legal issue that warrants this Court's attention, or even that the Fifth Circuit was wrong to conclude that the merits of the Establishment Clause issue cannot be decided now.

Unable to show that the mootness ruling should be reviewed based on its own merits, Staley proffers a series of arguments purporting to show that the vacatur and justiciability issues are so intertwined that this Court should review both together. In particular, she contends that (1) the issues of justiciability and vacatur are "inextricably intertwined in this case"; (2) "the vacatur arguments raised in the County's Petition implicate and conflict with the justiciability arguments that the County made below"; and (3) "reviewing the vacatur determination without also reviewing the justiciability determination would invite a logically incoherent and fundamentally unfair result." Cross-Pet. 1. All of these claims are misdirected for the simple reason that this Court is not in the habit of reaching out for fact-bound issues that provide the necessary predicate for the question that *is* certworthy. Each of these claims is also wrong on its own terms.

REASONS FOR DENYING THE CROSS-PETITION

I. This Case Does Not Fall Within The Contours Of The Voluntary-Cessation Doctrine, And The Fifth Circuit's Mootness Determination Is Thus Unsuitable For Review By This Court.

Although she does not fully articulate the presumption anywhere in her cross-petition, Staley relies throughout on the implicit contention that the County voluntarily ceased allegedly wrongful conduct in order to moot the case. *See, e.g.*, Cross-Pet. 5 (suggesting a link between mootness and vacatur analyses where "a defendant capitulates with the specific intent to undo an unfavorable decision"); *id.* at 6 (hinting that the County's conduct in this matter falls within the

scope of the "voluntary-cessation doctrine" for purposes of determining mootness). The Fifth Circuit's conclusion that this case is moot necessarily rejected the notion that the voluntary-cessation doctrine applies here. That is correct; it does not.

Although this Court has indeed held that, under certain circumstances, "the voluntary cessation of allegedly illegal conduct . . . does not make the case moot" (*DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) (citations and internal quotation marks omitted)), this doctrine has force only where the conduct voluntarily ceased is the same as the conduct actually challenged in the case. In other words, the defendant must cease the wrongful conduct that is challenged in the suit for the purpose of mooting the litigation and with a view toward resuming *wrongful conduct* after judicial proceedings have been dismissed. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (focusing on whether "the allegedly wrongful behavior" can be "expected to recur"). In this case, it is clear that the County neither removed the Monument to moot the litigation nor plans to replace it in the location and context in which the district court previously adjudicated it to be "wrongful." Since it is beyond doubt that the Monument will never again be located in the place that prompted Staley's suit, it is not the case that the County "is free to return to [its] old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Indeed, because even Staley concedes it is impossible to know at this point whether any redisplay will run afoul of this Court's context-sensitive Establishment Clause cases (Cross-Pet. 8), that ought to be the end of the matter.

In *DeFunis*, for example, a prospective law student sued after having been denied admission to a law school, claiming that the school's admission policies discriminated against him on the basis of his race. 416 U.S. at 314. The trial court ordered the school to admit the plaintiff pending appeal. *Id.* By the time this Court had the opportunity to hear oral arguments in the matter, the plaintiff was already in his final quarter of law school. *Id.* at 315-16. The school decided that

it would no longer challenge the plaintiff's enrollment because, pursuant to pre-existing university policies, enrollment in the final term before graduation was irrevocable. *Id.* at 316-17. The school thus did not voluntarily cease the conduct at issue in the case—its effort to maintain its admission policies in the face of the plaintiff's Equal Protection challenge—by making some unilateral change to those policies for the purpose of mooting the litigation. On the contrary, the school simply recognized changed circumstances and voluntarily declined to violate its own policies by attempting to oust the plaintiff in his final term at the school, when he would by the nature of the case never be in the original circumstances again. *Id.* at 318-19. If the school's action had been predicated on the former consideration, the voluntary-cessation doctrine would have applied and the case would not necessarily have been moot. *Id.* at 318.[2] Because it was predicated on the latter, the doctrine did not apply and the case was moot. *Id.*

For the same reasons that the voluntary-cessation doctrine did not apply in *DeFunis*, it does not apply in the instant matter. Here, Staley alleged an Establishment Clause violation based on the positioning and context of the Monument. By the time the Fifth Circuit had the opportunity to hear oral arguments in the matter, the County had removed the Monument in the midst of its long-planned wholesale renovations of the entire Harris County Civil Courts Building (the "Courthouse") and plaza where the Monument had stood. The County did not voluntarily cease the conduct at issue in this case—its effort to maintain the constitutionality of the Monument in its former position and context in the face of Staley's Establishment Clause challenge—by making some unilateral change to that position and context for the purpose

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[2] The voluntary-cessation cases cited by Staley fall into this category. *See, e.g., Friends of the Earth*, 528 U.S. at 189-90 (recognizing that a company's voluntary compliance with pollution standards would not moot a case, where no changed circumstances would prevent a return to its earlier activities).

of mooting the litigation. On the contrary, the County recognized that it had to move the Monument pursuant to its preexisting renovation plans and that the renovations at issue would make it physically impossible for the Monument to resume its former position and context. As in *DeFunis*, circumstances had changed in such a way as to render the former controversy lifeless. That the County voluntarily responded to the requirements of those changed circumstances does nothing to change that fact.

In its mootness analysis, the Fifth Circuit below simply recognized that the changed circumstances brought on by the renovation made it impossible to conduct *any* Establishment Clause analysis with respect to the Monument until it became clear if the Monument would be redisplayed and in what context that redisplay would take place. 07-100 Pet. App. 6a. As discussed further in Part III below, the Fifth Circuit followed this Court's relevant jurisprudence in recognizing the highly fact-intensive and context-dependent inquiries required for proper Establishment Clause analysis. With only one relevant fact clear—that the Monument, the Courthouse, and the plaza could not return to their original conditions after the completion of the renovations already underway—the Fifth Circuit had no alternative but to deem the case moot. It would be unsuitable for this Court to undertake a plenary review of the Fifth Circuit's interpretations of the factual circumstances underlying this determination.

II. The Issues Of Mootness And Vacatur Involve Entirely Separate Inquiries.

Staley further contends that the Fifth Circuit below struck "a balance between justiciability and vacatur" (Cross-Pet. 9), deeming it safe to hold the instant matter moot only because it intended to preserve the district court's judgment. Based on this perception of the Fifth Circuit's holding, Staley argues that it would be inappropriate to reopen the vacatur analysis without reopening the justiciability analysis as well. However, the Fifth Circuit recognized that, far from being inextricably intertwined as Staley would have it, the issues of

mootness and vacatur are entirely separate inquiries. In fact, it would be entirely improper for a federal court to make its threshold jurisdictional inquiries into mootness hinge on its intentions with respect to vacatur or indeed on any other external considerations. Because the Fifth Circuit came nowhere close to employing such an improper hedging tactic, this Court has no reason to review the justiciability holding.

Mootness, on the one hand, is a question of whether the plaintiff's "personal interest that . . . [allegedly] exist[ed] at the commencement of the litigation . . . continue[s] throughout its existence." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (citation and internal quotation marks omitted). If the plaintiff's alleged personal interest no longer exists and the case becomes moot, then there is no "case or controversy" for purposes of Article III of the Constitution such that federal courts have no subject matter jurisdiction. *See, e.g., id.* at 67 (observing that, where a matter is mooted while on appeal, it no longer "qualif[ies] as a case fit for federal-court adjudication"); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (noting that Article III "case or controversy" issues are threshold jurisdictional issues). Because federal courts lack jurisdiction over matters that have become moot, they must decide this issue first and without reference to any other consideration. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). As a jurisdictional analysis, the evaluation of mootness allows for no flexibility or balancing with other factors. *See, e.g., id.* ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." (citations and internal quotation marks omitted)).[3]

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[3] Staley suggests that this Court should review the justiciability issue so that it can "redress . . . inequity by taking . . . additional considerations into account as part of the justiciability analysis." Cross-Pet. 10. In support of this proposal, Staley cites *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000);

Vacatur, on the other hand, is a procedure employed *after* jurisdictional issues have been determined. A federal court must take the *results* of its jurisdictional determinations as the *starting point* for its evaluation of vacatur, and cannot conflate the two issues as Staley suggests. Having deemed a matter moot, a court must vacate as a matter of course where, as here, it finds that it was an action unrelated to the litigation that deprived the court of jurisdiction. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). In other circumstances, where, for example, the parties themselves mooted the matter through their own voluntary agreement to settle, a court may take certain equitable factors into account. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994). However, as discussed above, in no case may a federal court condition its analytically prior justiciability analysis on its later determinations with respect to vacatur or on any other external consideration.

The Fifth Circuit below quite properly kept its mootness analysis and its vacatur analysis entirely separate. It recognized as an initial matter that "[o]ut of sight in some ware-

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[Footnote continued from previous page]

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982); and *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199 (1968). In none of these cases, however, did this Court import equitable considerations into its justiciability analysis. Instead, it focused in each case entirely on the inquiry proper to mootness—whether or not the plaintiff retained a personal interest in the outcome. The Court simply noted in each case that one party's voluntary cessation of wrongful conduct in an effort to moot a case would not terminate the other party's personal interest due to the likelihood of recurrence. *See City of Erie*, 529 U.S. at 287-88; *Adarand*, 528 U.S. at 222; *Laidlaw*, 528 U.S. at 193-94; *City of Mesquite*, 455 U.S. at 289; *Concentrated Phosphate*, 393 U.S. at 203. Here, as discussed in Part I above, the Fifth Circuit understood that any suggestion that the County might redisplay the Monument in its past location, when the redesign and renovation of the Courthouse and plaza rendered such a redisplay physically impossible, could not carry the day in the mootness analysis.

house, the [M]onument no longer raises the potential Establishment Clause violations that offended Staley." 07-100 Pet. App. 6a. Furthermore, the Fifth Circuit held that "because there [were] no facts before [it] to determine whether [a possible] redisplay [of the Monument] might violate the Establishment Clause," it would be impossible "to conduct the fact-intensive and context-specific analysis required by *McCreary* and *Van Orden*." *Id.* Only *after* it thus "concluded that this appeal [was] moot" (*id.* at 7a) did the court turn to the question of "whether to vacate the district court judgment" (*id.*). The court gave no hint whatsoever that it was somehow striking "a balance between justiciability and vacatur" (Cross-Pet. 9) or using vacatur as "insurance" on its mootness holding (*id.*). A court may not strike a balance with other considerations in its jurisdictional analysis, and the Fifth Circuit below did no such thing.[4]

III. The Vacatur Arguments Raised By The County Before This Court Do Not Conflict With The County's Arguments Concerning Justiciability Before The Fifth Circuit Below.

In a continued struggle to link the issue of justiciability with the question of vacatur, Staley seeks to manufacture tension between the County's arguments regarding the former issue before the Fifth Circuit below and the County's argu-

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[4] Staley cites *Walling v. James V. Reuter, Inc.*, 321 U.S. 671 (1944), as a case in which this Court purportedly struck a similar "balance." *See* Cross-Pet. 9. On the contrary, nowhere in *Walling* did this Court even intimate that a federal court could or should conflate its jurisdictional and its vacatur analyses. Instead, this Court made the uncontroversial point that, because it would be practically impossible to proceed with the appeal due to lack of proper parties, it should leave the district court judgment intact and allow the relevant entities to appeal any attempted enforcement of that judgment. Like the Fifth Circuit below, the Court in *Walling* had already concluded its mootness analysis before entering into its vacatur analysis. It engaged in no "balancing" act between the two.

ments regarding the latter issue before this Court. No such tension exists.

Staley points to only one source of such alleged tension.[5] She argues that the County's argument (to the Fifth Circuit in support of mootness) that "it could not [redisplay the Monument] in the same manner as the old display" (Cross-Pet. 11) somehow conflicts with its argument (to this Court concerning the importance of vacatur) that the district court's ruling "'will impede future litigation, should the County decide to redisplay the Monument'" (*id.* (quoting 07-100 Pet. 16)). These arguments do not conflict at all. In fact, far from concealing its earlier argument, the County has already reiterated to this Court that "[t]he redesign of the Courthouse and plaza will make it physically impossible to return the Monument to its past location." 07-100 Pet. 5 n.1. Staley's perception of tension between this assertion and the County's statements elsewhere in its petition merely betrays her persistent confusion regarding the relationship between mootness and vacatur.

The County's statements concerning the redisplay of the Monument were designed to address the Fifth Circuit's concerns about mootness. In its mootness analysis, the Fifth Circuit properly followed *McCreary County v. ACLU*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677

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[5] In a footnote, Staley also oddly contends that the "arguments that the County makes regarding attorneys' fees are . . . in tension with the position it has taken on mootness. . . . Either the case is moot because Staley has prevailed; or Staley has not yet definitively prevailed and the case remains alive." Cross-Pet. 12 n.3. Staley thus shows a fundamental misapprehension of the mootness doctrine. A matter does not become moot because a party prevails. A matter becomes moot when the plaintiff no longer has a "personal interest" sufficient to give rise to an Article III "case or controversy." *Arizonans for Official English*, 520 U.S. at 68 n.22. Here, the fundamental changes in the circumstances from when Staley originally brought suit deprived her (and anyone else) of the concreteness that Article III requires. It is those changes that rendered the case moot.

(2005), in recognizing the fact-intensive nature of Establishment Clause cases. *See, e.g.*, 07-100 Pet. App. 5a ("'[N]o exact formula can dictate a resolution to such fact-intensive cases.'" (quoting *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring))); 07-100 Pet. App. 6a ("In the absence of [the requisite] evidence, we are unable to conduct the fact-intensive and context-specific analysis required by *McCreary* and *Van Orden*."). The Fifth Circuit thus stated a natural and uncontroversial proposition—that where there are almost no relevant facts available, a court cannot engage in a fact-intensive analysis.

The County's statements concerning the dangers of retaining the district court's judgment address a wholly different issue. When a district court issues an unreviewed and ultimately unreviewable judgment concerning constitutional issues, the impact of that judgment is by no means limited to the specific facts and context before it. Rather, the court sets a precedent which forms part of the jurisprudential backdrop against which courts and parties must evaluate even arguably analogous cases in the future. Certainly, if the County redisplays the Monument, even in a different location and different context, the district court's judgment in this matter will necessarily affect the course of any resulting litigation. After all, that judgment, however suspect it might be, interprets and applies the constitutional principles pursuant to which the redisplay must be evaluated. "Constitutional adjudication being a matter of great gravity and delicacy" (*Kremens v. Bartley*, 431 U.S. 119, 128 (1977) (citation and internal quotation marks omitted)), courts of appeals have "emphasized the avoidance of constitutional questions as one of the bases for vacatur," *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 354 (D.C. Cir. 1997) (citing, *inter alia*, *Kremens*, 431 U.S. at 128, 133-34 & n.15) (internal quotation marks omitted). The County's recognition of this basic principle in its contentions to this Court does not in any way conflict with or even relate to its earlier assertions that the Fifth Circuit could not conduct the necessary Establishment Clause analysis with the very limited facts before it. These state-

ments provide no grounds for this Court to review the Fifth Circuit's mootness analysis in this matter.

IV. Reviewing The Vacatur Determination Without Also Reviewing The Justiciability Determination Would Not Lead To Incoherence Or Unfairness.

In a final effort to suggest interconnectedness between the issues of justiciability and vacatur, Staley complains that reviewing the latter without review of the former would lead to an incoherent and unfair result. On the contrary, such review would permit the *only* logical and fair conclusion to this litigation.

It would be eminently logical for this Court to review vacatur without reviewing justiciability. As discussed above, the Fifth Circuit below arrived at two entirely separate holdings in this matter. It concluded that the matter was moot because the Monument no longer affected Staley and because there was insufficient information about a possible redisplay of the Monument to conduct an Establishment Clause analysis at this point. It independently held that the district court's judgment could stand, despite its recognition that "the bottom-line cause of the [Monument's] removal was related to the ongoing renovations." 07-100 Pet. App. 10a. The County's petition asks this Court to review not the particular facts undergirding each of these holdings, but rather the *logical relation* between the two holdings derived by the Fifth Circuit *from* those facts. This Court in *Munsingwear* observed that mootness through actions unrelated to the litigation should *automatically* result in vacatur. *See* 340 U.S. at 39-40. The County simply requests that this Court reiterate the necessity of that consequence in the face of the Fifth Circuit's erroneous view that *U.S. Bancorp* somehow undermined it. Doing so would simply reinforce the logic of *Munsingwear* itself.

Review of the vacatur holding alone would also not lead to an unfair result. Staley complains that such review would threaten to strip her of "both a favorable decision and the

ability to litigate her case to its conclusion, while at the same time having no assurance that the County will not simply repeat the selfsame challenged behavior immediately upon dismissal of the case." Cross-Pet. 10. However, as noted above, the redesign of the Courthouse and plaza will make it physically impossible for the County to return the Monument to its present location. As the Fifth Circuit recognized (07-100 Pet. App. 6a), any dispute about a potential redisplay of the Monument in some alternative location on the reconfigured premises is far too speculative at this point to give rise to any legitimate interest on the part of Staley. In fact, review of the Fifth Circuit's decision on vacatur will *prevent* unfairness by removing from any prospective litigants in this matter or analogous matters the burden of a suspect and unreviewable district court judgment with significant impact on First Amendment concerns.

CONCLUSION

For the foregoing reasons, the conditional cross-petition should be denied.

Respectfully submitted.

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